95-1626

Supreme Court, U.S.
FILED
1995

No. _____

In The

Supreme Court of the United States

October Term, 1995

PETER C. AMERICANOS,

Petitioner,

vs.

PAMELA CARTER, In her personal capacity and in her official capacity as the Attorney General of Indiana, DENNIS P. LEE, In his personal capacity and in his official capacity as Chief of Staff of the Attorney General of Indiana, DAVID C. HAMILTON, In his personal capacity, and THE STATE OF INDIANA,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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60 pp

QUESTIONS PRESENTED

1. Should the First Amendment protection against political firing of government employees be so narrowly applied that an individual holding an appointed governmental position is exempt from that First Amendment protection and also excluded from protection under Title VII of the Civil Rights Act of 1964 and the ADEA where the individual holds a position where he could *potentially* be given policymaking duties for which political party affiliation would be an appropriate requirement for effective performance of those duties, but where the individual does not *actually* perform such policymaking duties.

2. Whether an attorney who is performing legal work for a governmental entity is necessarily making policy decisions such that political party affiliation is an appropriate requirement for the effective performance of his duties.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Peter C. Americanos, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on January 9, 1996.

OPINIONS BELOW

On December 13, 1994, the United States District Court for the Southern District of Indiana, by Judge Larry J. McKinney, granted the Defendants' Motion to Dismiss and ordered all counts of the Plaintiff's Complaint dismissed with prejudice on the ground that the Complaint did not state a cause of action.[1] (App. 15-21). On January 9, 1996, a three judge panel of the United States Court of Appeals for the Seventh Circuit affirmed the decision of the United States District Court for the Southern District of Indiana. (App. 1-14).

JURISDICTION

Judgment of the United States Court of Appeals for the Seventh Circuit was entered on January 9, 1996. This Court has jurisdiction to consider this Petition from the final judgment of a United States Court of Appeals pursuant to 28 U.S.C. § 1254(1).

[1] The Decision of the District Court was written but not published.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of the United States Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Definition of term "employee" in Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act:

> The term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate advisor with respect to the exercise of the Constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision.

42 U.S.C. § 2000e(F); 29 U.S.C. § 630(F).

STATEMENT OF THE CASE

Peter C. Americanos was born in the Republic of Greece in 1941. He immigrated to the United States, graduated from college and law school, and became a naturalized American citizen. On February 1, 1973, he was hired as a law clerk and following his graduation from

law school and his admission to the Indiana Bar he was appointed a Deputy Attorney General of the State of Indiana[2] by the then Republican Attorney General, Theodore Sendak. Mr. Americanos remained in that position under General Sendak's successor Linley E. Pearson, also a Republican, and served as a Deputy Attorney General for approximately twenty years.

In November of 1992 the Defendant Pamela Carter, a Democrat, was elected Attorney General of Indiana and assumed the duties of that Office on January 11, 1993. She was the first Democrat Attorney General in twenty years. During her campaign for Attorney General Ms. Carter repeatedly stated that it was her intention to increase the number of African-Americans and women on the Attorney General's staff, particularly in higher positions. She also pledged to recruit "bright young lawyers" and "new solid law school graduates" for positions within the Attorney General's office and to encourage "youthful talent."

Following her election Carter appointed David Hamilton[3] as her transition director to assist her in assessing which employees of the Attorney General's office should be retained, but Hamilton never held a position within

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[2] All attorneys employed by the Attorney General of Indiana are designated by the title Deputy Attorney General regardless of their specific duties and responsibilities or position in the supervisory hierarchy of the office.

[3] Subsequent to the filing of this action, Defendant David Hamilton was appointed a United States District Judge for the Southern District of Indiana and was serving in that capacity when the District Court and the Court of Appeals issued their opinions.

Carter's administration. Carter selected Dennis P. Lee to be her Chief of Staff and he also aided Carter in selecting her staff.

Immediately prior and subsequent to the time when Carter assumed office, a number of attorneys employed by the Office of the Attorney General, almost all of whom were white male Republicans over the age of forty, were forced to resign from their positions. On February 3, 1993, Lee approached Americanos and directed him to submit his resignation by February 19, 1993. Americanos asked Lee why he was being discharged and Lee told him that he "did not meet the goals of the new Attorney General." When Americanos pressed Lee to elaborate on what those goals were, Lee responded that "they were extensively reported in the press," and refused to discuss the matter further.

On February 15, 1993, Americanos sent a letter to Lee requesting that he state the reasons why he was being asked to resign, and on February 18, Lee responded stating that Mr. Americanos' resignation "was requested after it was determined that your contributions to the operation of the office do not fit the expectations of the current Attorney General." On February 19, 1993, Mr. Americanos handed in his letter of resignation under protest.

Following his firing Americanos filed a complaint with the Equal Employment Opportunity Commission claiming that he was discharged on the basis of race, national origin, and age. In her response to the EEOC Carter stated that she requested the Plaintiff's resignation because he was identified as not having the skills or traits

necessary to achieve the goal of providing first class legal representation to the State of Indiana and because he was insufficiently "enthusiastic" in regard to Carter's stated goal of improving the quality of legal representation provided by the Attorney General. The EEOC did not file suit on behalf of Americanos but instead issued Right to Sue letters in regard to both the civil rights and age discrimination claims.

Mr. Americanos filed suit against Carter, Hamilton, Lee, and the State of Indiana claiming that he was dismissed because he was (1) a member of the Republican Party, in violation of 42 U.S.C. § 1983, as well as his First and Fourteenth Amendment rights of freedom of speech and association, (2) a caucasian male of Greek origin, in violation of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e, *et seq.*, and (3) 52 years old, in violation of the Age Discrimination in Employment Act, (ADEA), 29 U.S.C. § 621, *et seq.*

The Defendants filed a Motion to Dismiss pursuant to Fed.R.Civ.P. 12(b)(6) arguing that Americanos' Complaint failed to state a claim upon which relief could be granted. The Defendants' position was that Americanos as a Deputy Attorney General held a policymaking position for which political party affiliation was an appropriate requirement for the effective performance of his duties and that, therefore, he could be discharged for political reasons and was not an employee within the meaning of Title VII and the ADEA. Defendants maintained that Americanos was not, in fact, dismissed on account of his political affiliation, race, national origin, or age, but that in any case he was barred from bringing suit on those grounds.

The District Court granted the Defendants' Motion to Dismiss and held as a matter of law that the position of Deputy Attorney General of Indiana, "carries with it inherently the responsibility to have meaningful input into governmental decision making on issues where there is room for principled disagreement on goals or their implementation." (App. 19). The District Court, therefore, concluded that the position of Deputy Attorney General is exempt from the constitutional prohibition against politically motivated firing. In reaching its conclusion the District Court considered the statutory duties of the Attorney General of Indiana and noted that the Attorney General is authorized to appoint deputies to assist in the performance of the duties office. Reasoning that all of the statutory duties of the Attorney General are delegable to Deputy Attorneys General, the Court concluded that, "the function of the Deputy Attorney General is essentially the same as the Attorney General." (App. 17). Because the position of the Attorney General of Indiana is of a nature that it would be exempt from the prohibition against political firing, it followed, in the District Court's view, that all Deputy Attorneys General positions were also exempt from the prohibition against political firing. The District Court found it unnecessary under its analysis to consider the specific duties and responsibilities of the Plaintiff Peter Americanos.

The United States Court of Appeals for the Seventh Circuit affirmed the District Court and adopted its reasoning. The Court held that it would look only to the duties inherent in the position at issue, here the position of Deputy Attorney General, and would make no examination of the management structure of the Office or the

specific duties and responsibilities of an individual Deputy Attorney General. The Court of Appeals reasoned that all of the duties of the Attorney General could be delegated to deputies and that all deputies were, therefore, *potentially* in policymaking positions. Plaintiff contended that only some of the approximately 90 Deputy Attorneys General were in policymaking positions and only those policymakers could be discharged for political reasons. The Court of Appeals rejected this argument and stated flatly that, "if some DAGs can be terminated based on their political affiliation, all can be." (App. 8).

Plaintiff supplied the Court of Appeals with affidavits from the Honorable Linley E. Pearson, the former Republican Attorney General of Indiana, (App. 22-24), and J. Gordon Gibbs, Jr., the former Division Chief and supervisor of Plaintiff Mr. Americanos. (App. 25-26). In his affidavit Mr. Pearson explained the organizational structure of the office during his tenure and that there were approximately 80 Deputy Attorneys General and that heads of divisions who exercised policymaking and supervisory authority were designated, "Chief Counsel." Usually only five deputies held the position of Chief Counsel. All other deputies were under the supervision of the Chief Counsels. Mr. Gibbs was the Chief Counsel responsible for supervising and directing the activities of Mr. Americanos.

According to the affidavits Mr. Americanos' duties were to represent approximately twenty State boards and committees, advise them on various principles of administrative law and Indiana statutes, and answer their legal questions and those of their staff. He also represented those agencies in both state and federal courts if law suits

were filed against them. In Mr. Pearson's view, political party affiliation was not a requirement for the position. Mr. Americanos was not called upon to make policy and was required to refer all issues and questions involving politics and/or policy to Chief Counsel Gibbs.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS EMASCULATES THE PROHIBITION AGAINST POLITICAL FIRING OF PUBLIC EMPLOYEES ESTABLISHED BY THE *ELROD, BRANTI* AND *RUTAN* TRIAD OF CASES.

The Court of Appeals held that the First Amendment prohibition against political firing of public employees did not protect an individual who held a position where he could *potentially* be given policymaking duties for which political party affiliation would be an appropriate requirement for effective performance of his duties, but where the evidence before the court was that the individual did not *actually* perform such policymaking duties.

In a series of three cases this Court recognized that terminating the employment of public employees because of political affiliation or party loyalty violated their First Amendment rights of Freedom of speech and association. *Rutan v. The Republican Party of Illinois*, 497 U.S. 62, 110 S.Ct. 2729 (1990); *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287 (1980); *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673 (1976).

In *Elrod* this Court held that the Sheriff of Cook County, Illinois, violated the First Amendment rights of

employees by discharging them based on whether or not the employee supported his campaign for Sheriff. However, recognizing "the need to insure that the policies which the electorate has sanctioned are effectively implemented," 96 S.Ct. at 2689, the Court carved out an exception for patronage dismissals of public employees in policymaking, *Id.* at 2689, or confidential positions, *Id.* at 2690 (Stewart, J., concurring).

In *Branti* this Court applied this doctrine and found a constitutional violation in the discharge of Assistant Public Defenders of Rockland County, New York, because they were members of a political party other than that of the newly appointed Public Defender. The Court, however, modified the holding of *Elrod* and concluded: "[t]he ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." 100 S.Ct. at 1295.

In *Rutan* this Court applied the *Elrod-Branti* doctrine to personnel decisions other than firing such as hiring, recall, promotion, and transfer.

The purpose of the doctrine recognized in *Elrod* and *Branti* and most recently affirmed in *Rutan* was to reach an accommodation between protecting the First Amendment rights of public employees and insuring that elected officials can implement their policies upon assuming office. This accommodation was reached by narrowly defining the class of public employees who could be fired

because of party affiliation to those individuals who function in positions for which party affiliation is a necessary requirement for effective performance. As Justice Stevens observed in his concurring opinion in *Rutan*, "a government's interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing certain *high-level employees* on the basis of their political views." 110 S.Ct. at 2737 (emphasis added).

The case before the Court involves an attorney in a large government legal office, the Attorney General of Indiana, which employs approximately 90 attorneys serving in various capacities. All attorneys hold the same title, Deputy Attorney General. Under Indiana law virtually any duty or responsibility of the Attorney General may be delegated to a Deputy Attorney General.

Some, probably most, of the Deputy Attorneys General perform non-controversial legal tasks such as collecting monies owed the state, condemning land for State projects, or representing the State in criminal appeals. Performance of these duties does not involve making policy decisions, certainly not policy decisions which are in any way related to partisan party politics. Some limited number of Deputy Attorneys General will perform policymaking and supervisory functions for which party affiliation is an appropriate requirement for the effective performance of their duties. The Attorney General, in order to effectuate the policies he or she was elected to implement, would need to depend upon the political and personal loyalty of his or her top policymaking deputies.

The District Court granted the Defendants' Motion to Dismiss the Plaintiff's suit in this case without any inquiry as to the specific duties and responsibilities of the Plaintiff or any consideration of the essential constitutional question of whether political party affiliation was an appropriate requirement for the effective performance of those duties.

Instead, the District Court and the court of Appeals, relying on Seventh Circuit precedent to the effect that in determining the applicability of the prohibition against political firing a court must examine the powers inherent in a given position rather than the actual functions that the occupant of that position performed. While that principle may be reasonable in the abstract its application in this case was not. Between 80 and 90 attorneys are designated Deputy Attorneys General. Certainly, it is unreasonable to say that all of the attorneys hold the same position and have the same duties and responsibilities. Rather, the term Deputy Attorney General is better thought of as a title as opposed to a position. The District Court and the Court of Appeals, however, would not look beyond that designation and make a reasoned determination of which Deputy Attorneys General are to be protected from political firing and which are not.

Both courts examined the statutory duties of the Attorney General, noted that those duties could be delegated to deputies, and concluded that all deputies had potentially the same duties and responsibilities as the Attorney General herself. It was not necessary to determine the actual duties and responsibilities of a given Deputy Attorney General because any deputy could potentially be given policymaking responsibilities. That

being the case, all deputies held positions for which party affiliation was an appropriate requirement for the effective performance of their duties and all could be fired for political reasons.

The Plaintiff respectfully suggests to this Court that the analysis engaged in by the District Court and the Court of Appeals has the effect of emasculating the *Elrod, Branti, Rutan* doctrine that most public employees have a constitutionally based protection against politically motivated firing. In those cases this Court sought to reach an accommodation between the First Amendment rights of public employees and the interest of the public in seeing that elected officials can implement their policies by limiting the class of public employees who could be fired because of political affiliation to those individuals who function in positions for which party affiliation was a necessary requirement for effective performance. In the instant case the District Court and the Court of Appeals simply refused to make the kind of analysis required by this Court and in so doing robbed the *Elrod, Branti, Rutan* doctrine of all force and effect as applied to the Office of the Attorney General of Indiana.

In recognizing that the First Amendment rights of public employees protected them from politically motivated firing, this Court acted to the benefit of those employees. Less obviously, this Court also acted to the benefit of the public at large. The prohibition against political firing insures that the public will benefit from the services of experienced public employees. Mass political firings, such as occurred in the Indiana Attorney General's office, deprive the public of the benefits of experienced and confident public servants. Also, such

wholesale firings necessarily cause significant interruption in the legal affairs of the State as new attorneys attempt to become familiar with ongoing litigation without the assistance, and probably with the outright hostility, of their predecessors. Finally, valuable institutional memory is lost. All of these circumstances occurred to the detriment of the citizens whom the Attorney General is sworn to serve. The District Court and The Court of Appeals sanctioned these disruptions without requiring any showing that they were necessary to insure the implementation of the policies of the newly elected Attorney General. These same kinds of disruptions will likely occur the next time the office changes hands from Democrat to Republican. Plaintiff suggests that these are precisely the kinds of evils that the *Elrod, Branti, Rutan* doctrine was designed to prevent.

Finally, the decision of the Court of Appeals in this case raises an even more pernicious possibility. The Plaintiff in this case, in addition to his political firing claim, also alleged that his rights under Title VII and the ADEA had been violated. He claimed that his firing from the Attorney General's office was not only due to his affiliation with the Republican party but also due, in part, to the fact that he was a white male over the age of 40. Plaintiff recognizes that the analysis to determine whether or not an individual is an employee within the meaning of Title VII or the ADEA is the same as the analysis to determine whether or not an individual may constitutionally be fired for political reasons. The Court of Appeals held that Deputy Attorneys General of the State of Indiana were not employees within the meaning of those two acts.

The Court of Appeals holding has the effect of creating a sort of racial, gender, and age spoils system. During the campaign Pamela Carter clearly stated her intention to place African-Americans and women in responsible positions in the Attorney General's office and to attempt to attract "bright young lawyers" and "new solid law school graduates", to serve as Deputy Attorneys General and to encourage, "youthful talent." Aging white men were apparently regarded as a disposable commodity and upon taking office Ms. Carter proceeded to dispose of them. It is not inconceivable that a future Attorney General with a different set of political and group allegiances would see fit to similarly dispose of African-Americans, women, and "youthful talent."

It has been approximately six years since this Court addressed the political firing question. All of this Court's decisions on the subject have engendered conflicting views among the members of this Court. Courts of Appeal throughout the nation have observed that the *Elrod, Branti, Rutan* doctrine is difficult to apply in individual cases. The Plaintiff respectfully suggests that this case presents an appropriate occasion for this Court to revisit the political firing question.

II.

THERE IS A BODY OF COURT OF APPEALS CASE LAW, INCLUDING THE DECISION IN THE INSTANT CASE, WHICH MAKES THE UNWARRANTED ASSUMPTION THAT AN ATTORNEY PERFORMING LEGAL WORK FOR A GOVERNMENTAL ENTITY IS NECESSARILY MAKING POLICY DECISIONS AND THAT, THEREFORE, POLITICAL PARTY AFFILIATION IS AN APPROPRIATE REQUIREMENT FOR THE EFFECTIVE PERFORMANCE OF HIS DUTIES.

In the instant case the District Court and the Court of Appeals assumed without analysis that a Deputy Attorney General doing legal work for the State of Indiana was engaging in policymaking and, that, therefore, political party affiliation was an appropriate requirement for the effective performance of the duties of that position. There is a large body of case law from the various Circuit Courts of Appeal to the effect that government attorneys are not covered by the general prohibition against political firing.

For example, despite the fact that this Court in *Branti* specifically reserved the question of whether a deputy prosecutor could be discharged for political reasons, *Branti, supra* 100 S.Ct. at 1295 n.13, a number of circuits have held that an attorney in that position may be discharged. *Monks v. Marlinga*, 923 F.2d 423, 425 (6th Cir. 1991) (Assistant Prosecutor); *Lives v. Petka*, 711 F.2d 798, 801 (7th Cir. 1983) (Assistant State's Attorney), *Mummau v. Ranck*, 687 F.2d 9, 10 (3rd Cir. 1982) (Assistant District Attorney). Similarly, a number of courts have held that assistant city attorneys or assistant county attorneys may be fired for political reasons. *Ness v. Marshall*, 660 F.2d 517

(3rd Cir. 1981) (Assistant City Solicitor), *O'Connell v. Gorski*, 715 F.Supp. 1201, 1203 (W.D.N.Y. 1989) (Assistant County Attorney), *Finkelstein v. Barthelemy*, 678 F.Supp. 1255, 1260-61 (E.D. La. 1988) (Assistant City Attorney). *But see, Newcomb v. Brennan*, 558 F.2d 825, 830 (7th Cir. 1977), (Policymaking Deputy City Attorney subject to political firing but non-policymaking Assistant City Attorneys protected by civil service). In all of these cases there appears to be an unspoken assumption that the manner in which a governmental attorney will perform legal work on behalf of his or her government client will be affected in some way by political party loyalty.

Both the Court of Appeals and the District Court took the position that because the Attorney General is vested with statutory authority to conduct a broad range of legal business for the State and can delegate that authority to deputies, the Attorney General must be able to discharge all Deputies for political reasons in order to be able to implement his or her policies. Nowhere in their opinions do the courts state just exactly what those policies might be and why it takes a Democrat rather than a Republican to implement them. The Attorney General represents the State in appeals of criminal convictions in the Indiana reviewing courts. What policy could be instituted in regard to criminal appeals that would require a loyal Democrat appellate lawyer to implement? Similarly the Attorney General is charged with the responsibility to collect monies owed the State. What policy could be in place that would require a Democrat collection attorney?

The decisions of this Court make clear that in order to justify discharging an employee because of political party affiliation the State must show not only that the

employee is a policymaker, but that the policy in question is somehow related to politics. *Branti, supra,* 100 S.Ct. at 1291. Further, the burden is on the State to prove an overriding interest, of vital importance, requiring that the employee's private beliefs conform to that of the hiring authority. *Id.* at 1293.

Even if Deputy Attorneys General were in some sense engaging in policymaking by doing legal works for the State, a position which has been rejected by the Indiana Supreme Court, *State ex rel. Sendak v. Superior Court of Marion County,* 373 N.E.2d 145 (Ind. 1978), that policymaking is not related to political party affiliation. Petitioner is at a loss as to how party affiliation might impact the answering of interrogatories, the taking of depositions, or other common litigation tasks.

The Court of Appeals observed that a consideration which it typically applied in political firing questions was whether an opposition loyalist in the position in question could reasonably serve to threaten the policy goals of the party in power. *Selch v. Letz,* 5 F.3d 1040, 1044 (7th Cir. 1993), *cert denied,* 114 S.Ct. 1189 (1994). The Court of Appeals approved the District Court's conclusion that an opposition party loyalist in the position of Deputy Attorney General could reasonably serve to threaten the policy objectives of the Attorney General.

Implicit in this conclusion by the District Court and the Supreme Court is the view that a government attorney would permit his handling of legal work to be determined by partisan politics. The Court appears to be suggesting that a Deputy Attorney General might intentionally sabotage a case for partisan political objectives.

The District Court and the Court of Appeals display a disturbing lack of faith in the ethics and professionalism of attorneys in government service.

As a general principle, a lawyer's personal views and philosophy should have no impact upon the representation he gives a client. By professional training and the requirements of professional responsibility, a lawyer makes his client's interests paramount. It is not at all uncommon for a lawyer to be placed in a situation of advocating a position in which he or she does not personally agree.

The assumption made by the District Court and the Court of Appeals seems to be that the government lawyer and the government client must be of the same political party or else the government lawyer might subordinate the interests of his client to the interest of the lawyer's party. A member of the staff of a State Attorney General will, however, often be in the position of representing a government official from the other party. For example, if the Attorney General were a Republican and the Secretary of State were a Democrat, the representative of the Attorney General's office might be inclined to sabotage the interests of his political adversary. Thus, the problem that the Court of Appeals perceived, an attorney subordinating the interests of his client to political considerations, might well occur even if the Deputy Attorney General were of the same party as the Attorney General.

The flaw in the reasoning of the District Court and the Court of Appeals is in the basic assumption that how a government attorney performs legal work for his government client will be affected by political considerations.

There is no basis for this assumption and the assumption presupposes that a government attorney will ignore the Cannons of Ethics. Indeed, the assumption made by the District Court and the Court of Appeals is the very opposite of the assumption that should be made, that is, that a government attorney will conduct himself or herself in a professional and ethical manner and place the interests of his client paramount and that his or her conduct of the legal affairs of his client will not be affected by political consideration.

The assumption made by the Court of Appeals was specifically rejected by this Court in *Branti*:

> We cannot accept the proposition, however, that there cannot be "mutual confidence and trust" between attorneys, whether public defenders or private practitioners, unless they are of the same party. To the extent that petitioner lacks confidence in his assistants he has inherited from the prior administration for some reason other than political affiliation, he is, of course, free to discharge them.
>
> *Branti, supra,* 100 S.Ct. at 1295 n.14.

A survey of the reported cases dealing with political firing reveals that a significant number of those cases involve government attorneys. There is a disturbing body of case law which suggests, in essence, that government attorneys are automatically policymakers and are exempt from the constitutional prohibition against political firing. The Plaintiff suggests that this is an unwarranted and dangerous doctrine and one that is particularly appropriate for review by this Court.

CONCLUSION

For the reasons stated above, the Petitioner, Peter C. Americanos, prays that this Court will grant a Writ of Certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

Robert C. Perry

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 95-1156
PETER C. AMERICANOS,

Plaintiff-Appellant,

v.

PAMELA CARTER, in her personal capacity and in her official capacity as the Attorney General of Indiana, DENNIS P. LEE, in his personal capacity and in his official capacity as Chief of Staff of the Attorney General of Indiana, DAVID HAMILTON, in his personal capacity, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana,
Indianapolis Division. No. 94 C 40 –
Larry J. McKinney, *Judge.*

ARGUED SEPTEMBER 19, 1995 – DECIDED JANUARY 9, 1996

Before CUMMINGS, BAUER and COFFEY, *Circuit Judges.*

COFFEY, *Circuit Judge.* Peter C. Americanos was terminated from his position as a Deputy Attorney General ("DAG") for the State of Indiana. He filed suit in district court claiming that he was discharged because he was (1) affiliated with the Republican Party, (2) a Caucasian male of Greek origin, and (3) fifty-two. The defendants filed a motion to dismiss, arguing that Americanos failed to state a claim upon which relief could be granted. Fed. R. Civ. P.

12(b)(6). The district court granted the defendants' motion and Americanos appeals. We AFFIRM.

I. FACTUAL BACKGROUND

Americanos, who was born in the Republic of Greece in 1941 and became a naturalized American citizen in 1972, was a DAG for the State of Indiana from June 11, 1973, until February 19, 1993. On November 3, 1992, Pamela Carter, a Democrat, was elected Attorney General ("AG") of the State of Indiana. Carter's campaign included promises to recruit "bright young lawyers" and "new solid law school graduates" for the position of DAG, and to encourage "youthful talent."

Carter's transitional director, David Hamilton, assisted her in assessing which employees were worthy of retention, but he never held a position within Carter's administration. Carter selected Dennis P. Lee to be her Chief of Staff of the Attorney General, and he too aided Carter in composing her staff.

Immediately prior and subsequent to the time when Carter assumed her office, Americanos alleged that a number of employees, almost all of whom were white, male, Republicans, over the age of forty, were "told to resign from their positions." On February 3, 1993, Lee approached Americanos and asked him to submit his resignation by February 19, 1993. The plaintiff inquired of Lee as to why he was being discharged, and according to Americanos, Lee merely stated that he "did not meet the goals of the new Attorney General." When Americanos pressed Lee to elaborate on what those goals were, Lee

allegedly responded that "they were extensively reported in the press," and discussed the matter no further.

On February 15, 1993, Americanos sent a letter to Lee requesting that he state the reasons why he was being asked to resign, and on February 18 Lee responded, stating that the plaintiff's resignation "was requested after it was determined that your contributions to the operations of the office do not fit the expectations of the Attorney General." On February 19, the plaintiff handed in his letter of resignation, under protest.

Americanos filed a charge with the Equal Employment Opportunity Commission ("EEOC"), claiming that he was terminated because he is a Caucasian male of Greek origin. The plaintiff's complaint alleged that during the EEOC's investigation of the charges, Carter claimed that she requested the plaintiff's resignation because "he was identified as not having the skills or traits necessary to achieve the goal of providing first class legal representation to the State of Indiana and because he was insufficiently 'enthusiastic' in regard to [her] stated goal of improving the quality of legal representation provided by the Attorney General."[1]

Americanos filed suit against Carter, Hamilton, Lee and the State of Indiana, claiming that he was dismissed because he was: (1) a Caucasian male of Greek origin, in violation of Title VII, 42 U.S.C. § 2000e, *et seq.*, (2) a member of the Republican party, in violation of 42 U.S.C.

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[1] After investigation, the EEOC decided not to file suit and issued Americanos a right to sue letter, authorizing him to pursue a private action against the defendants.

§ 1983, as well as his First and Fourteenth Amendment right to freedom of association, and (3) fifty-two years old, in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.*

The defendants filed a motion to dismiss, arguing that Americanos' complaint failed to state a claim upon which relief could be granted, Fed. R. Civ. P. 12(b)(6), which the district court granted. Americanos appeals.

II. ISSUES

Americanos appeals two issues: (1) whether the district court committed error when it determined that the position of DAG is one for which political party affiliation is an appropriate requirement for the effective performance of the DAG's duties; and (2) whether the court committed error when it found that a DAG is not an "employee" under Title VII or the ADEA.

III. DISCUSSION

We review a Fed. R. Civ. P. 12(b)(6) motion for "failure to state a cause of action upon which relief can be granted" *de novo. Kolman v. Sheahan*, 31 F.3d 429, 431 (7th Cir. 1994). "In our review, we take the well-pleaded allegations of the complaint as true, and we consider the facts alleged in the light most favorable to the nonmoving party." *Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund*, 25 F.3d 417, 420 (7th Cir. 1994) (citations omitted). "We will affirm the court's dismissal if it appears beyond doubt that [the plaintiff] can prove no set of facts in support of his claim which would entitle him

to relief." *Kolman*, 31 F.3d at 431 (quotation omitted, alteration in original).

A. POLITICAL PATRONAGE

Americanos contends that the district court committed error when it determined that political party affiliation was an appropriate condition of employment for a DAG. He asserts that the duties and responsibilities of the approximately eighty DAGs in Indiana varied greatly and that political association was a valid job qualification for only five of the DAGs, who held the title of Chief Counsel. Americanos describes his position as non-political, non-controversial, and one which afforded him no opportunity to influence or define policy for the State of Indiana. He argues that his personal political views had no bearing on his ability to perform his job. Americanos further maintains that the district court had insufficient factual information before it concerning his specific duties as a DAG to grant the motion to dismiss.

"Although the practice of [political] patronage dismissals clearly infringes First Amendment interests, our inquiry is not at an end, for the prohibition on encroachment of First Amendment protections is not an absolute." *Elrod v. Burns*, 427 U.S. 347, 360 (1976). The Supreme Court has recognized that "party affiliation may be an acceptable requirement for some types of government employment. . . . [I]f an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency." *Branti v. Finkel*, 445

U.S. 507, 517 (1980) (citing *Elrod*, 427 U.S. at 366). The relevant inquiry in such cases is "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Id.* at 518; *see also, Heideman v. Wirsing*, 7 F.3d 659, 662-63 (7th Cir. 1993). "Thus, only if political loyalty is 'essential to the discharge of the employee's governmental responsibilities,' can his patronage dismissal survive a First Amendment challenge." *Tomczak v. City of Chicago*, 765 F.2d 633, 640 (7th Cir.), *cert. denied*, 474 U.S. 946 (1985) (quoting *Branti*, 445 U.S. at 1294).

"This court has elaborated the relevant inquiry in broad terms. The test is whether the position held by the individual authorizes, either directly or indirectly, meaningful input into governmental decision-making on issues where there is room for principled disagreement on goals or their implementation." *Heideman*, 7 F.3d at 663 (quotation and citations omitted). We have also made it clear that "*Elrod* require[s] [us] to examine the 'powers inherent in a given office,' rather than the actual functions of the occupant of that office performed." *Heck v. City of Freeport*, 985 F.2d 305, 309 (7th Cir. 1993) (quoting *Tomczak*, 765 F.2d at 641).[2]

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[2] "We explained that the reason for so limiting the inquiry was two fold; first, to relieve courts of the burden of reevaluating the nature of a position every time a new administration changes the mix of responsibilities bestowed upon the officeholder; and second, to provide certainty to litigants." *Heck*, 985 F.2d at 309 (citing *Tomczak*, 765 F.2d at 641).

Contrary to the plaintiff's assertion, the district court did not assume that all DAGs hold the same position within the Office of the Attorney General. The court looked to the statutory scheme governing the Office of the Attorney General and recognized that each DAG may be authorized to "perform on behalf of . . . the state *any and all of the rights, powers or duties now or hereafter conferred by law or laws upon the attorney general.*" Ind. Code Ann. § 4-6-5-1.9 (emphasis added). As such, the judge properly noted that a DAG could *potentially* be called upon to perform any of the enumerated duties of the AG, such as "prosecuting and defending suits by or against the state and state officers, defending suits against state governmental officials or employees or teachers, advising state officials through opinions, advising state agencies, [and] collecting outstanding debts owed to the state." The trial court further recognized that "[t]he deputy is the public representative of the office." *Accord, Roberts v. State*, 278 N.E.2d 285, 290 (Ind. App. 1 Dist. 1972) (a DAG acts in the name of the AG).

Americanos places great reliance on our opinion in *Kolman*, 31 F.3d 429, for the proposition that the district court should have denied the motion to dismiss based on an insufficient factual record. In *Kolman*, the discharged plaintiffs were deputies and investigators in the Cook County Sheriff's Electrical Monitoring Unit (EMU) who monitored the electronic tracking devices placed on prisoners who were released from the Cook County jail due to overcrowding. *Id.* at 430. This court determined that the EMU is an "obscure department" in the Cook County sheriff's office, and we noted that we could not even

"resort to common knowledge to know about the plaintiff's job responsibilities." *Id.* at 432. Thus, we were unable to determine whether the deputies and investigators were positions for which political affiliation was an appropriate job requirement in the context of a motion to dismiss. *Kolman* is distinguishable from the case at bar, however, because the duties and responsibilities of a DAG are easily ascertainable from the Indiana Code. *See Newcomb v. Brennan*, 558 F.2d 825, 829 (7th Cir.), *cert. denied*, 434 U.S. 968 (1977) ("matters of public record such as state statutes . . . fall within the category of 'common knowledge' ").

The plaintiff concedes in his appellate brief that there are certain DAGs who "hold positions for which party loyalty is an indispensable qualification for the effective performance of their duties," and argues that only "[t]hese deputies could be removed from their positions for political reasons." Because we must look to the "powers inherent in a given office, rather than the actual functions the occupant of that office performed," *Heck*, 985 F.2d at 309, Americanos' concession is fatal to his claim that his First and Fourteenth Amendment rights were violated, for if some DAGs can be terminated based on their political affiliation, all can be.

In light of the fact that the DAG acts on behalf of the State of Indiana, Americanos' position inherently carries with it the ability to have "meaningful input into governmental decision-making on issues where there is room for principled disagreement on goals or their implementation." *Heideman*, 7 F.3d at 663. Although Americanos asserts that he "was required to refer all issues and questions involving politics and/policy making to Chief

Counsel," and let that person make the ultimate decision on how to implement the AG's goals, it is likely that in making such referrals Americanos was asked to advise his superiors concerning what his research into these issues revealed, and what he thought would be the correct course of legal action. The plaintiff's mere participation in these types of discussions establishes that he had "meaningful input" into deciding how to handle legal issues for the state. Furthermore, even if Americanos and his superiors agreed on the black letter of the law, there was certainly the potential for principled disagreement on which goals were primary in the AG's representation of the state and its interests, and how to achieve results consistent with those priorities.

Political loyalty to the AG is an "appropriate requirement for the effective performance" of the position of DAG, *Branti*, 445 U.S. at 518, because "elected officials cannot implement the policies that they were elected to carry out, and hence the will of the electorate cannot be effectuated, unless the officials can install their political allies in the most sensitive jobs." *Selch v. Letts*, 5 F.3d 1040, 1044 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 1189 (1994) (quotation omitted). We have held that a Republican could be fired from his position as a subdistrict superintendent for the Indiana Department of Highways, which was headed by a Democratic director, because "an opposition party loyalist in the position in question could reasonably serve to threaten the policy goals of the party in power." *Id*. Selch, as subdistrict superintendent, was responsible for the direction and coordination of the maintenance for over 800 miles of highways within his district, and managed over 60 employees and a $1,000,000

budget. *Id.* Although Selch claimed that there was no room for principled disagreement over "which potholes were to be filled," we recognized that because Selch had "almost unbridled authority" to direct the work within his subdistrict, he was in a position to thwart the goals of the Director of the Department of Highways. *Id.* at 1045.

Although Americanos cannot be said to have unbridled authority in the performance of his job, the district court properly noted that "because it is impossible to monitor all the activities of the deputies, an opposition party loyalist in the position of deputy attorney general could reasonably serve to threaten the policy objectives of the attorney general." Additionally, in *Tomczak* we cautioned against applying a "myopic view of the role of politics in the seemingly a political context" of the City of Chicago's Water Department. 765 F.2d at 641. We stated that although the position of First Deputy of the Department involved only "mundane decisions concerning the repair and rehabilitation of the water systems, and [did not entail] decision-making authority in areas in which there could be principled disagreements about goals or their implementation," we recognized that even a Deputy with no policy-making authority still played a vital role in the implementation of the Director's goals. *Id.* This role was sufficiently tied to the Director's success or failure that we held political affiliation to be an appropriate job requirement. *Id.*

In *Upton v. Thompson*, 930 F.2d 1209 (7th Cir. 1991), *cert. denied*, 503 U.S. 906 (1992), we examined the issue of whether deputy sheriffs could be fired based on their political support of an opposition candidate. We answered that question in the affirmative, noting that

"[g]iven the dependency of the sheriff (and his political survival) on his deputies' job performance, it is understandable why a sheriff might believe that party loyalty is an appropriate consideration for a deputy sheriff." *Id.* at 1216. So too does AG Carter's political tenure depend on her ability to successfully implement her goals and priorities, and she may validly assume that the political party affiliation of her DAGs will play a part in her success as AG.

In *Livas v. Petka,* we held that a prosecutor was "entitled to demand absolute loyalty from his assistants" and was permitted to dismiss any assistant in whom he had "lost confidence . . . for whatever reasons," including political reasons. 711 F.2d 798, 801 (7th Cir. 1983). In so holding, we stated that:

> A public prosecutor . . . exercises broad public responsibilities in the performance of his duties. A prosecutor's 'client' is not an individual, but society as a whole. And the prosecutor has the broad discretion to set whatever policies he or she believes necessary to protect the interests of society.
>
> One of the problems faced by a prosecutor . . . is that his policies are implemented by subordinates. . . . The public interest in the efficient administration of justice requires that decisions made by such assistant prosecutors conform with the broad objectives chosen by the prosecutor.

Id. at 800-01. Similar to the assistant prosecutors in *Livas,* DAGs have the direct ability to implement the policies and goals of the AG for the State of Indiana. As such,

their political loyalty to the AG is of the utmost importance to the AG's confidence in her DAGs.

Finally, we note that the legislature of the State of Indiana also felt that it was important for an AG to employ the legal staff of his or her choosing for it provided that "[t]he attorney general shall have the power and authority to remove any deputy at any time," Ind. Code Ann. § 4-6-5-1, and DAGs are exempt from state civil service laws. Ind. Code Ann. § 4-15-2-3.8. The AG has the statutory right to hire and fire without cause. Indiana case law also tells us that an AG has no power to appoint a DAG for any longer than his or her own term of office. *Roberts*, 278 N.E.2d at 290. Thus, a newly elected AG, such as Carter, or one that is appointed for a specific term of office, is under no obligation to retain DAGs from the former administration, such as Americanos.

This court has had occasion to note that when dealing with a system of political patronage, "All they that take the sword shall perish with the sword." *Upton*, 930 F.2d at 1218 (quoting Matthew 26:51). Therefore, if Americanos' tenure with the Office of the Attorney General was terminated because he was a Republican,[3] he has failed to state a claim upon which relief can be granted, Fed. R. Civ. P. 12(b)(6), because his First and Fourteenth Amendment right to freedom of association was not violated for

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[3] In their appellate brief, the defendants "steadfastly deny [that] Plaintiff was discharged because of his political affiliation or discriminated against on any unlawful basis," but because we are reviewing a motion to dismiss, we must take Americanos' allegations in his complaint as true. *Arst*, 25 F.3d at 420.

his political party affiliation was an appropriate condition of his continued employment as a DAG, and he could be dismissed from his position without cause. Americanos was hired by a Republican AG and was retained in his position by successive Republican AGs. During that time, it is likely that qualified Democrats applied for positions as a DAG but were denied employment because the AG desired a staff of DAGs who were of a similar political persuasion to himself. Americanos benefitted from the patronage system for his entire legal career; he cannot now argue that the very patronage system which provided him with job security for twenty years is unconstitutional.

B. EMPLOYEE STATUS UNDER ADEA AND TITLE VII

The ADEA and Title VII exempt certain public officials from their protections:

> The term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate advisor with respect to the exercise of the Constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision.

29 U.S.C. § 630(f); 42 U.S.C. § 2000e(f). Americanos, in his appellate brief, concedes that the test for determining if

someone is an "employee" within the definition of these two statutory schemes "is essentially indistinguishable from that applied in the political firing context under the *Elrod/Branti* doctrine." Indeed, he is wise to do so for we have held that "the reasons for exempting the office from the patronage ban apply with equal force to the requirements of the ADEA [and Title VII]." *Heck*, 985 F.2d at 310. We hold that the district court properly dismissed Americanos' age, gender, and national origin discrimination claims, for a DAG is not an "employee" within the purview of either Title VII of the Civil Rights Act of 1964 or the ADEA.

AFFIRMED.

A true Copy:

Teste:

/s/ _____
Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

PETER C. AMERICANOS, Plaintiff, v. PAMELA CARTER, in her personal capacity and in her official capacity as the Attorney General of Indiana; DENNIS P. LEE, in his personal capacity and in his official capacity as Chief of Staff of the Attorney General of Indiana; DAVID HAMILTON, in his personal capacity, and THE STATE OF INDIANA, Defendants.	)	CAUSE NO. IP 94 0040 C

ORDER ON DEFENDANTS' MOTION TO DISMISS

Plaintiff Peter Americanos ("Americanos") was appointed to the position of deputy attorney general by Republican Attorney General Theodore Sendak in the early seventies. Americanos is a Republican. Sendak was succeeded by a two-term Republican. Americanos was reappointed both times. In 1992, Defendant Pamela Carter ("Carter") was elected Attorney General on the Democrat ticket and Americanos lost his job.

The complaint has three counts. Americanos alleges in Count 1, brought under 42 U.S.C. § 1983, that Carter and members of her staff conspired to fire him because of his affiliation with the Republican party. He alleges that

he was told that his resignation was requested "after it was determined that [his] contribution to the operations of the office [did] not fit the expectations of the current Attorney General." Americanos submitted his resignation "under protest." He alleges that the explanation he received for the demand of his resignation was a pretext and that he was constructively fired for being a Republican. He further alleges race, gender, national origin and age discrimination in Counts 2 and 3.

Defendants deny any unlawful motive in the request for Plaintiff's resignation. For the purposes of this motion to dismiss, however, Defendants assert that Plaintiff's position as deputy attorney general is exempt from the constitutional prohibition against dismissal based on political affiliation and that Plaintiff's position is not covered by Title VII or the ADEA. The Court for purposes of this entry assumes that Plaintiff's allegation that he was fired for his political affiliation is true.

The parties agree that the crucial question that must be answered for the resolution of Count 1 is whether Plaintiff held a position of a confidential or policymaking nature. The case of *Tomczak v. City of Chicago*, 765 F.2d 633, 641 (7th Cir.), *cert. denied*, 474 U.S. 946 (1985), focuses this Court's inquiry on the functions of the office involved rather than the actual functioning of the officeholder. This approach makes sense else an employee holding a position of a confidential policymaking nature and performing in an inefficient or insubordinate fashion could by his or her very inadequacy become a merit employee.

The function of the office of attorney general and the deputies appointed by the attorney general is strictly

statutory. The attorney general and her deputies can perform no function for the state other than those specifically delineated by statute. I.C. § 4-6-1-6. The function of the deputy attorney general is essentially the same as the attorney general. The attorney general is authorized to appoint deputies "as he may deem necessary to promptly and efficiently perform the duties of his office . . . " I.C. § 4-6-1-4. Further, the attorney general is authorized "to assign any deputy so appointed to any agency of the state of Indiana to perform in behalf of such agency and the state any and all of the rights, powers or duties now or hereafter conferred by law or laws upon the attorney general . . . " I.C. § 4-6-5-1.

The duties of the attorney general are specifically listed in the statutes. These duties include prosecuting and defending suits by or against the state and state officers, defending suits against state governmental officials or employees or teachers, advising state officials through opinions, advising state agencies, collecting outstanding debts owed to the state, and filing various reports. All these duties are delegable to the deputies.

An attorney-client relationship exists between the deputy attorney general and the state client he or she represents. That confidential relationship between lawyer and client of necessity puts the lawyer involved in a policymaking situation. When clients ask for legal advice, and, as is often the case, the law admits of more than one interpretation, the reply given will influence state policy. Thus, the position of deputy attorney general is involved directly by statute and indirectly considering the attorney-client privilege with "meaningful input into governmental decisionmaking on issues where there is room for

principled disagreement on goals or their implementation." *See Tomczak*, 765 F.2d at 641; *Selch v. Letts*, 5 F.3d 1040, 1043 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1189 (1994). Furthermore, because it is impossible to monitor all the activities of the deputies, an opposition party loyalist in the position of deputy attorney general could reasonably serve to threaten the policy objectives of the attorney general. *See Selch*, 5 F.3d at 1044.

True, individual deputy attorneys general may not make policy in the sense of meeting with the boss regularly to map political or personnel strategy. But the deputy attorney general performing his or her attorney function is of necessity involved in governmental decisionmaking. Whether the deputy is representing a state board at a meeting of the board, or advising that board in writing on an issue of procedure or substance, or advising a state official on a legal issue in an official or unofficial opinion, or representing the interests of the state in a lawsuit either as plaintiff or defendant, a deputy attorney general is vested with the same authority as the attorney general herself. The deputy is the public representative of the office. The very nature of the authority vested in the position requires the making of decisions and the exercising of judgment that amounts to the making of policy.

A recent Seventh Circuit case, *Kolman v. Sheahan*, 32 F.2d 429, 431-34 (7th Cir. 1994), which denied a motion to dismiss a political firing claim, is distinguishable. In that case, the court stressed that the record was silent regarding the nature of the positions at issue. The positions were within an obscure department in county government and could well have been inconsequential or meaningless with respect to policymaking. The court simply

had no idea. *See id.* at 432. In this case, the inherent powers of the deputy attorney general are found in the statutes. The deputy attorney general has the same power and authority as the attorney general.

The Court finds that the position described by statute as deputy attorney general carries with it inherently the responsibility to have meaningful input into governmental decisionmaking on issues where there is room for principled disagreement on goals or their implementation. The statutory conferral to the attorney general of the right to remove deputies at any time, *see* I.C. § 4-6-5-1, reflects this expectation, as does the fact that deputies' terms expire at the same time as the appointing attorney general's term, *see Hord v. State*, 79 N.E. 916, 921-22 (Ind. 1907); *see also Roberts v. State ex rel. Jackson Co. Bd. of Com'rs*, 278 N.E.2d 285, 290 (Ind. Ct. App. 1972), as does the fact that deputies are exempt from the state's civil service laws. *See* I.C. § 4-15-2-3.8.

For all the above reasons, the Court concludes that the position of deputy attorney general is exempt from the constitutional prohibition of politically motivated firing. Absent that prohibition, Americanos could be fired for his political affiliation. *See Selch*, 5 F.3d at 1047. Count 1 is DISMISSED WITH PREJUDICE.

Counts 2 and 3 fail for the same reasons. *See Heck v. City of Freeport*, 985 F.2d 305, 310 (7th Cir. 1993). Both the ADEA and Title VII contain the following exemption:

> [T]he term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by

> such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate advisor with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision.

29 U.S.C. § 630(f); 42 U.S.C. § 2000e(f). The position of deputy attorney general falls within the exemption. Each attorney who serves on the attorney general's staff as her deputy, by the inherent nature of the position, is an employee on the policymaking level and an immediate advisor to the attorney general with respect to the constitutional or legal powers of the office. Again, the fact that a particular deputy attorney general may not be asked to provide the kind of advice or service that another might be asked to provide is not controlling. The nature of the position, not the actual performance in that position, is what controls.

Plaintiff cites *Rabouin v. Colorado Department of Law*, 754 F. Supp. 171, 173-74 (D. Colo. 1990), in which a motion to dismiss the Title VII claim of a Colorado assistant attorney general was denied. The court was concerned that the plaintiff was the most junior attorney in the office and had no policymaking authority. The court, however, did not look to any statutes defining the powers or duties of the attorney general or assistants.

Defendants counter *Rabouin* with more persuasive authorities, including *Monce v. City of San Diego*, 895 F.2d 560 (9th Cir. 1990). In *Monce*, the city successfully moved to dismiss an age discrimination claim filed by a deputy city attorney. The plaintiff was a trial deputy, one of the

lowest positions in the office, with little individual authority. Looking to statutes like those applicable here, the Ninth Circuit concluded that the position was subject to the personal staff exemption. The Court reasoned:

> Although Monce did not have an immediate personal relationship with the City Attorney and was not personally entrusted with a great deal of responsibility, as a deputy city attorney he was placed in the public eye as a representative of the City Attorney's Office and was empowered to exercise the legal authority of that office.

Id. at 561.

For all the above reasons, the Court concludes that Americanos has failed to state a claim under either the ADEA or Title VII. Counts 2 and 3 are DISMISSED WITH PREJUDICE.

IT IS SO ORDERED this 13 day of December, 1994.

/s/ Larry J. McKinney
LARRY J. McKINNEY, JUDGE
United States District Court
Southern District of Indiana

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STATE OF INDIANA)
)
COUNTY OF CLINTON)

AFFIDAVIT

The undersigned, Linley E. Pearson, being first duly sworn, states:

1. He is an attorney, duly licensed to practice law in the State of Indiana. He is currently serving as the elected Circuit Court Judge of Clinton County, Indiana.

2. He has served three consecutive four-year terms as the duly elected Attorney General of the State of Indiana, from early January, 1981 to January 10, 1993.

3. In that capacity he employed approximately eighty Deputy Attorneys General, including Peter C. Americanos. All attorneys employed by the office had the title of Deputy Attorney General. Heads of divisions who exercised policy making and supervisory authority were designated "Chief Counsel." Usually five Deputy Attorneys General held the position of Chief Counsel. All other Deputy Attorneys General were under the supervision of the Chief Counsels.

4. Peter C. Americanos' duties were to represent approximately twenty state boards and committees, advise them on the Administrative Orders and Procedures Act, the Open Door Law, the Public Records Law, and other related statutes, and to answer their legal questions and those of the boards' staff. He also represented those state agencies in both state and federal courts if a lawsuit was filed against them.

5. Political party affiliation was not a requirement for his position. He often represented officials and board members of the other political party. Politics was never a requirement for the effective performance of his duties, and to the best of my knowledge, he always followed the orders and policy set by myself or the Chief Counsels.

6. He was not required, was never asked to, and never did provide direct or indirect meaningful input into governmental decision-making on issues where there was room for principled disagreement on goals or their implementation. He was never invited to, and never attended any meetings where policy matters were discussed. He never possessed confidential information or records that affected decisions, aside from information protected by the attorney-client privilege.

7. He was required to refer all issues and questions involving politics and/or policy making to Chief Counsel Jay Gordon Gibbs, Jr., and in his absence, to any other Chief Counsel in the Attorney General's Office.

8. He did not have authority to hire, terminate, transfer, promote, or discipline personnel, order furniture, office supplies, or assign parking privileges.

9. Further, he did not have the authority to initiate, settle, compromise, negotiate or otherwise terminate litigation without prior authorization by a Chief Counsel or by myself.

10. He had no authority to communicate with legislators, the press, or visit the Indiana legislature, without prior approval, as above stated.

11. Aside from chance encounters in the street, I rarely saw or talked to him (our offices were in different

buildings) and to the best of my recollection I telephoned him approximately once or twice a year. Those conversations lasted no more than a few minutes.

12. To the best of my recollection he was an excellent state employee and very knowledgeable in the field of state administrative law.

Dated: March 31, 1995

Signed: Linley E. Pearson
Linley E. Pearson

VERIFICATION

I affirm under the penalty of perjury that the foregoing representations are true to the best of my knowledge and belief.

/s/ Linley E. Pearson
Linley E. Pearson

STATE OF INDIANA)
)
COUNTY OF HENDRICKS)

AFFIDAVIT

The Undersigned, Jay Gordon Gibbs, Jr., being first duly sworn states:

1. He is an attorney duly licensed to practice law in the State of Indiana.

2. As such, he was employed in the Office of the Attorney General of Indiana as Divisional Chief of the Departments Division of the said office until on or about January 10, 1993.

3. In that capacity he supervised approximately 30 Deputy Attorneys General, including Peter C. Americanos.

4. Peter C. Americanos' duties were to represent approximately twenty state boards and committees, advise them on the Administrative Orders and Procedures Act, the Open Door Law, the Public Records Law, and other related statutes, and to answer their legal questions and those of the boards' staff. He also represented those state agencies in both state and federal courts if a lawsuit was filed against them.

5. His position, unlike mine, was non-policy making, and he had no input whatsoever into government decision making on issues where there was room for principled disagreement on goals or their implementation. Pursuant to my instructions he never participated in meetings where policy matters or politics were discussed.

6. Peter C. Americanos was required to and did refer to me all issues and questions involving politics and/or policy making, was not permitted to talk to the press, visit the legislature, talk to legislators or anybody else regarding policy-making matters of the Attorney General of Indiana without prior approval.

7. He was an excellent employee, outstanding Deputy Attorney General, an authority in the field of state Administrative Law and an asset to the State of Indiana.

Dated: March 27, 1995

Signed: J Gordon Gibbs, Jr.
Jay Gordon Gibbs, Jr.

VERIFICATION

I affirm under the penalty of perjury that the foregoing representations are true to the best of my knowledge and belief.

/s/ J Gordon Gibbs, Jr.
Jay Gordon Gibbs, Jr.